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IN THE
COURT OF APPEALS OF INDIANA

ARVINYL METAL LAMINATES, CORP. and JAMES H. BARRETT,	)	
Appellants-Defendants,	)	
vs.	)	No. 49A04-0512-CV-702
ARVINYL METAL FINISHING GROUP, LLC,	)	
Appellee-Derivative Defendant,	)	
and	)	
JOSEPH A. THOMAS, JOSEPH A. THOMAS KEOGH, THE COLUMBIA FIRST GROUP, LTD., CARL W. GROW, CARL W. GROW	)	

FAMILY, L.P., LAWRENCE BARTLETT, THE JOHN JENNEY TRUST, MARK McCAUGHEY, JOHN GIDMAN and GREG B. STEVENS,

Appelles-Plaintiffs.

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cale J. Bradford, Judge
Cause No. 49D01-0402-CT-312

September 25, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Arvinyl Metal Laminates and James Barrett (collectively, "Barrett" or "Laminates") appeal a judgment for Arvinyl Metal Finishing Group, Joseph A. Thomas, and others (collectively, "Thomas" or "Finishing"). Barrett asserts on appeal the trial court erred by declining to set aside a partial summary judgment for Thomas; by declining to dismiss Thomas' complaint; by striking a counter-affidavit Barrett offered; and by entering a money judgment for Thomas without evidence to support it. We affirm and remand with instructions.

FACTS[1] AND PROCEDURAL HISTORY

We stated the underlying facts of this litigation in *Arvinyl Metal Laminates v. Thomas*, No. 49A02-0404-CV-344 (Ind. Ct. App. January 28, 2005) ("*Arvinyl I*"), *trans. denied* 831 N.E.2d 749 (Ind. 2005):

> Barrett and the appellees, Joseph A. Thomas, et al. (collectively "Thomas"), were the owners of Arvinyl Metal Finishing Group, LLC ("AMFG"), an Indiana limited liability corporation. In September 1999, AMFG secured a loan from Union Planters Bank, which was guaranteed by Barrett and several of the appellees. AMFG, which later went into bankruptcy, defaulted on this loan, and Union Planters Bank filed a complaint in Marion County Superior Court Seven against Barrett, Fred M. Barrett, and appellees Carl W. Grow, Greg B. Stevens, and The Columbia First Group to collect on the loan.
>
> In response to this situation, Stevens, Grow, and The Columbia First Group filed a cross claim against Barrett. Two days later, a complaint was filed by Thomas on behalf of all of the appellees [Finishing] against Barrett in Marion County Superior Court Twelve. Both this complaint and the cross claim alleged that Barrett had breached his fiduciary duties to AMFG and had committed fraud upon AMFG's investors.
>
> Following this, both Barrett and Thomas filed a flurry of motions. Barrett filed motions to dismiss both Thomas' complaint and the cross claim. Subsequently, both of the actions against Barrett were consolidated before Judge Gerald Zore in the Marion County Superior Court Seven. Although it is not entirely clear, the trial court apparently denied both of Barrett's motions to dismiss. Shortly thereafter, Thomas filed a first and then a second amended complaint. Barrett filed a motion to dismiss Thomas' second amended complaint on October 25, 2002, pursuant to Indiana Trial Rule 12(B)(6). The trial court took no immediate action to rule upon this motion.
>
> On January 17, 2003, Thomas filed a motion for partial summary judgment with regard to whether Barrett had breached his fiduciary duties. Barrett filed a motion in response to Thomas' motion for partial summary judgment on March 14, 2003. Included with this motion was an affidavit

[1] Barrett's Statement of Facts does not comply with our rules, which require a narrative and fair statement of the facts without argument. *Nicholson v. State*, 768 N.E.2d 1043, 1049 (Ind. Ct. App. 2002). Barrett's Statement of the Case and Statement of Facts include argument that is inappropriate in those parts of an appellate brief. *See County Line Towing, Inc. v. Cincinnati Ins. Co.*, 714 N.E.2d 285, 289-90 (Ind. Ct. App. 1999) (a Statement of the Facts should be a concise narrative of the facts stated in a light most favorable to the judgment and should not be argumentative), *trans. denied* 735 N.E.2d 219 (Ind. 2000).

> from Barrett. On March 27, 2003, Thomas moved to strike Barrett's affidavit, arguing that Barrett had made therein several false statements. The trial court granted Thomas' motion for partial summary judgment on May 28, 2003.
>
> Of particular significance to this case, on June 27, 2003, Barrett filed a motion asking the trial court to reconsider its order granting Thomas' motion for partial summary judgment and grant his motion to dismiss. On July 8, 2003, the trial court issued an order purporting to grant Barrett's motion to reconsider. In the July 8, 2003 Order, the trial court first reversed itself and ordered that Thomas' motion for partial summary judgment should be denied. It further provided that Thomas' motion to strike Barrett's affidavit was denied. The trial court last ordered that Barrett's motion to dismiss was granted and that Thomas should have "no right to replead." Appellant's Appendix at 518.
>
> On July 17, 2003, Thomas filed a motion asking the trial court to reconsider its July 8, 2003 Order. The trial court never ruled on this motion, and Thomas never filed a motion to correct error or a notice of appeal from the July 8, 2003 order. On July 28, 2003, Judge Zore recused himself and Judge Steven Frank of the Marion County Superior Court One was assigned to replace him. In November 2003, the case was transferred to Marion County Superior Court Twelve, but in December 2003, the case was returned to Judge Cale Bradford in Marion County Superior Court One.
>
> On February 26, 2004, Thomas filed a motion entitled "Motion to Strike Court's Defective Order of July 8, 2003 Pursuant to Indiana Trial Rule 60 and Set for Oral Argument." Appellant's App. at 628. In this motion, Thomas argued that the July 8, 2003 Order should be set aside pursuant to Indiana Trial Rules 60(A) and 60(B)(3). On March 22, 2004, the trial court granted Thomas' February 26, 2004, motion and reinstated this case. This appeal ensued.

Slip op. at 2-4 (footnotes omitted).

We determined Barrett's June 27, 2003, motion to reconsider the partial summary judgment for Thomas was automatically deemed denied pursuant to Ind. Trial Rule 53.4(B) because it had not been ruled on within five days. As a result, the July 8, 2003, order that purported to deny Thomas' motion for partial summary judgment, deny Thomas' motion to strike Barrett's affidavit, and grant Barrett's motion to dismiss was "a

nullity" and the summary judgment for Thomas "still stands." *Id*. at 6. Barrett sought rehearing, after which we clarified our opinion but affirmed it in all respects. Our Supreme Court denied Barrett's petition to transfer.

We remanded for further proceedings, again noting the order granting partial summary judgment for Thomas "still stands." *Id*. at 7. On remand Barrett moved to set aside the partial summary judgment for Thomas and to dismiss the complaint. In support of his motion to dismiss he resubmitted the affidavit initially filed in March, 2003 in response to Thomas' motion for partial summary judgment. The trial court struck the substance of the affidavit and denied the motions.

DISCUSSION AND DECISION

Before we address the issues Barrett purports to raise, we note that we did not, as Barrett suggests throughout his brief, "reinstate" the summary judgment. Barrett states, for example, "the partial summary judgment entry was reinstated *sua sponte* in this Court's unpublished memorandum opinion" (Defendant-Appellants' Br. at 9); this court "reinstated it *sua sponte* . . . without citing any authority to support reinstatement" (*id*. at 15); and "the summary judgment entry . . . was gratuitously reinstated by this Court." (*Id*. at 31.)

Nothing in *Arvinyl I* or our decision on rehearing states, or even suggests, we "reinstated" the judgment. As we explained at some length in *Arvinyl I*, the trial court granted Thomas' motion for partial summary judgment on May 28, 2003. Barrett moved to reconsider and on July 8, 2003, the trial court issued an order purporting to grant the motion to reconsider and to order Thomas' motion for partial summary judgment be

denied. We determined the July 8 order was a "nullity" and the prior order granting partial summary judgment to Thomas therefore "still stands." *Arvinyl I*, slip op. at 6. We remanded, noting once again the "Order granting [Thomas] partial summary judgment still stands. Therefore further proceedings are only required with regard to [Thomas'] fraud claim." *Id*. at 7-8 n.4. Our Supreme Court denied Barrett's petition to transfer. As the July 8 order granting Barrett's motion to dismiss was a "nullity," the summary judgment was always in effect; we did not reinstate it, "gratuitously" or otherwise.

1. Striking of Barrett's Affidavit

We review for an abuse of discretion a trial court's decision to strike an affidavit. *Meyer v. Marine Builders, Inc.*, 797 N.E.2d 760, 767 (Ind. Ct. App. 2003). We will reverse such an exercise of discretion only when the decision is clearly against the logic and effect of the facts and the circumstances. *Id*.

The only evidence Laminates submitted in opposition to Thomas' motion for partial summary judgment was an affidavit of James H. Barrett, who was Laminates' president, a director, and its largest individual shareholder. The trial court struck the substance of the affidavit on the ground it conflicted with the evidence Barrett had designated prior to that point, including his admissions and deposition.[2] *See Miller v. Monsanto Co*., 626 N.E.2d 538, 543 (Ind. Ct. App. 1993) (a non-movant may not create issues of fact by pointing to affidavit testimony that contradicts the witness's sworn

[2] Barrett's counsel asserts the trial court "failed to specify why those specific provisions of the affidavit were struck" (Defendants-Appellants' Reply Br. at 13) and "failed to cite any authority cited [sic] showing that [Barrett's] evidence was inadmissible" (Defendants-Appellants' Br. at 44). In fact, the trial court explicitly did both. (See Defendants-Appellants' App. at 644-45.)

testimony in a prior deposition); *Pathman Const. Co. of Highland Park v. Drum-Co Engineering Corp.*, 402 N.E.2d 1, 9 (Ind. Ct. App. 1980) (statements in affidavit by Pathman's vice-president were properly struck because they had been previously deemed admitted by Pathman).

Barrett does not acknowledge, explain, or otherwise address in his initial brief the conflicts between the affidavit and the previously-designated evidence on which the trial court's ruling was explicitly premised. Barrett does, in his reply brief, assert without explanation or citation to the record that Barrett's statements in his affidavit "are consistent with his deposition testimony [and] his answers to the request for admissions . . . a careful reading of all cited documents fails to find contradictions or conflicts." (Defendants-Appellants Reply Br. at 14.)

Barrett has accordingly failed to demonstrate the trial court abused its discretion in striking his affidavit.[3] *See, e.g.*, *Young v. Butts*, 685 N.E.2d 147, 150 (Ind. Ct. App. 1997) (declining to consider Young's allegations of error on appeal because Young's counsel "has not favored us with a cogent argument supported by legal authority and references to the record as our rules require"); Ind. Appellate Rule 46(A)(8).

[3] Barrett correctly notes Thomas "fail[s] to point out just wherein these supposed 'conflicts' exist." (Defendants-Appellants' Reply Br. at 14.) However, he does not explain why Thomas, as the appellee, would be obliged to do so.

2. Denial of Barrett's Motion to Set Aside Partial Summary Judgment

Barrett asserts on appeal the summary judgment should have been set aside due to "multiple factual and credibility disputes." (Defendants-Appellants' Br. at 31.) We disagree.

We review for an abuse of discretion the denial of a motion to set aside a judgment. *See Wheatcraft v. Wheatcraft*, 825 N.E.2d 23, 31 (Ind. Ct. App. 2005) (dissolution decree); *Whitt v. Farmer's Mutual Relief Ass'n*, 815 N.E.2d 537, 541 (Ind. Ct. App. 2004) (default judgment). T.R. 56(E) provides, in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

A nonmovant may not rest on bare allegations made in the pleadings, but must respond with affidavits or other evidence setting forth specific facts showing there is a genuine issue in dispute. *Myers v. Irving Materials, Inc.*, 780 N.E.2d 1226, 1228 (Ind. Ct. App. 2003), *reh'g denied*. Myers did not designate any materials in response to Irving's Motion for Summary Judgment, but instead contended a genuine issue of material fact was put before the trial court when Irving designated Myers' Answer To Complaint in support of its Motion For Summary Judgment. Because Myers did not come forward with specific evidence in opposition to Irving's materials, we accepted Irving's designated materials as true. *Id*.

Laminates offered in opposition to Thomas' motion for partial summary judgment only an affidavit by Barrett, who was Laminates' president, a director, and its largest individual shareholder. As explained above, Barrett has not demonstrated the trial court abused its discretion in striking that affidavit, so Barrett's opposition to Thomas' motion consists only of its pleadings. Because Barrett did not come forward with specific evidence in opposition to Thomas' materials, we accept Thomas' designated materials as true.

Barrett asserts a report by Dan Corcoran (the "Corcoran Report"), which report was designated by Thomas, gives rise to certain genuine issues of material fact to the extent it corroborates issues raised in Barrett's stricken affidavit. A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue. *Estate of Sullivan v. Allstate Ins. Co.*, 841 N.E.2d 1220, 1225 (Ind. Ct. App. 2006). To be considered "genuine" for the purpose of summary judgment, an issue of material fact must be established by sufficient evidence in support of the claimed factual dispute to require a jury or judge to resolve the parties' differing versions of the truth at trial. *Id*. An inference is not reasonable when it rests on no more than speculation or conjecture. *Id*.

Barrett asserts there are at least five genuine issues of material fact supported by the Corcoran Report.[4] We find none.

[4] As Barrett's affidavit was properly stricken, we consider only those alleged issues of fact that Barrett asserts are independently supported by the Corcoran Report.

First, he notes one of the Finishing plaintiffs alleged Barrett misled an accountant about the financial status of Arvinyl Finishing, but appears to argue this allegation is in dispute because "The Corcoran report is critical of [that plaintiff's] bookkeeping as to transfers." (Defendants-Appellants' Br. at 24.) We find no such statement, and nothing in the portion of the Corcoran Report to which Barrett directs us that explicitly or implicitly supports that characterization. Even if there was a statement to the effect the report was "critical" of that bookkeeping, we could not characterize that statement and the allegation Barrett misled an accountant as "differing versions of the truth" that must be resolved at trial.

Second, Barrett points to the allegation he took proprietary information from Arvinyl Finishing. He asserts the Corcoran Report substantiates his stricken affidavit, where he said there was no such proprietary information. The page of the Corcoran Report to which he directs us is the cover page, which does not "substantiate" his claim or otherwise address whether proprietary information existed.

Third, Barrett asserts "[Plaintiff Carl Grow] says that Barrett and Corona[5] took business from [Finishing] in the form of business that required a 'double laminate.'" (*Id*.) The Corcoran Report, he says, corroborates his statement in the stricken affidavit that Finishing did not have the capability to perform that task and only Corona could do it.

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[5] In his brief, Barrett sometimes refers to himself and Laminates collectively as "Corona." (Defendants-Appellants' Br. at 3.) He does not explain this reference in his statement of facts, but it appears from the record that Corona was Barrett's corporation, to which he allegedly improperly diverted assets of Finishing.

We note initially that Barrett offers us no citation to the location in the record[6] where any such statement by Grow might be found. He has accordingly waived the allegation Grow's statement and the Corcoran Report demonstrate a genuine issue of material fact. *See Carter v. Indianapolis Power & Light Co*., 837 N.E.2d 509, 514 (Ind. Ct. App. 2005) (Carter waived review of an issue he purported to raise because his "argument is bereft of citations to authority or to the three-volume, 750-page appendix in which the disputed evidence appears"), *reh'g denied*. *And see Indiana Waste Systems of Indiana, Inc. v. Indiana Dept. of State Revenue*, 633 N.E.2d 359, 367 (Ind. Tax 1994) (in a summary judgment proceeding it is not the role of the reviewing court to make a party's case or to find the evidence supporting that case).

Notwithstanding the waiver, we find no error. The Corcoran Report does indicate the business Barrett diverted involved double laminate product that Finishing "did not have the capability to produce." (Defendants-Appellants' App. at 788.) But Thomas alleges Finishing had "purchased double-sided lamination capacity" (*id*. at 56) and equipment, and there were "booked orders." (*Id*.) Thomas provided an exhibit in support. In light of the designated evidence Finishing had booked orders to do that type of work, we cannot say Barrett's statement that Finishing did not have the present capability to perform that task and only Corona could do it gave rise to a genuine issue of fact that would "require a jury or judge to resolve the parties' differing versions of the

[6] We granted Barrett's "Motion to Utilize and Cite to the Previous Interlocutory Appeal Record, Briefs, and Appendices and Motions Filed in Cause Number 49A02-0404-CV-344." This incorporated into the record before us, in addition to the 873-page appendix and 125-page transcript filed in this case, what Barrett's counsel aptly described as "the voluminous prior Appendices submitted by the Appellants-Defendants and the sheer number of pleadings in this matter."

truth at trial." *Estate of Sullivan*, 841 N.E.2d at 1225. The designated evidence indicates that even if Finishing did not have present capability to do double-laminate work, it was acquiring that capability and did have double-laminate "business," in the form of its booked orders, that Barrett could have "diverted."

Fourth, Barrett asserts, again without citation to the record,[7] "Grow alleged that Barrett failed to prepare a marketing plan." (Defendants-Appellants' Br. at 25.) He then directs us to documents that "show the marketing plan was prepared by Grow." (*Id*.) We find no inconsistency in the statements that Grow prepared the marketing plan that Barrett failed to prepare, and Barrett offers no cogent argument why an "issue" arises from the statements that Grow prepared the plan and Barrett did not. Nor does Barrett explain why that evidence supports "conflicting inferences on such an issue." *Estate of Sullivan*, 841 N.E.2d at 1225. We find no error.

Fifth, Barrett asserts, without citation to the record,[8] that Grow alleged Barrett committed conversion by transferring equipment or inventory from Finishing to Laminates without authorization. Conversion occurs when a person knowingly or intentionally exerts unauthorized control over another person's property. *Lambert v. Yellowbird, Inc.*, 496 N.E.2d 406, 410 (Ind. Ct. App. 1986), *clarified on denial of reh'g* 498 N.E.2d 80 (Ind. Ct. App. 1986), *trans. denied*. Barrett asserts the Corcoran Report "substantiates Barrett's statement," (Defendants-Appellants' Br. at 25), in his stricken affidavit that Grow was aware of the transfer. We find no such substantiation in the

[7] This allegation of error is accordingly waived.

[8] This allegation of error is accordingly waived.

pages of the Corcoran Report to which Barrett directs us. Even if the Report did include such substantiation, we would decline to find evidence Grow was aware of Barrett's acts necessarily demonstrates the acts were "authorized."

Barrett has not demonstrated the Corcoran Report gives rise to genuine issues of material fact that would preclude summary judgment for Thomas and we accordingly do not reverse on that ground.

3. Denial of Barrett's Motion to Dismiss Thomas' Complaint

Barrett asserts Thomas' complaint should have been dismissed because the complaint was a derivative action[9] and "[a] 'derivative action' can only be brought by minority owners." (Defendants-Appellants' Br. at 28.) The Finishing plaintiffs, Barrett asserts, were majority owners and therefore could not bring this action.

Barrett cites in support of this premise *Riggin v. Rea Riggin & Sons, Inc.*, 738 N.E.2d 292 (Ind. Ct. App. 2000), but does not favor us with any indication where, within that fifteen-page opinion, such a statement might be found.[10] Our independent search of the *Riggin* decision reveals no such limitation on who may bring a derivative action. In the absence of convincing argument supported by legal authority, *see* App. R. 46(A)(8),

[9] In fact, the complaint included both derivative and individual claims.

[10] Barrett does in a footnote subsequently direct us to page 302 of the *Riggin* decision, where we noted a derivative plaintiff "usually" represents only a minority of shareholders. That statement does not support Barrett's assertion "[a] 'derivative action' can only be brought by minority owners." (Defendants-Appellants' Br. at 28.)

We direct Barrett's counsel to Ind. Appellate Rule 22, which provides that citations to decisions in briefs are to follow the format put forth in the current edition of A Uniform System of Citation (Bluebook). When referring to specific material within a source, a citation should include both the page on which the source begins and the page on which the specific material appears. Uniform System of Citation Rule 3.3 (17th ed. 2000).

we decline Barrett's apparent invitation to hold this lawsuit should have been dismissed because the Finishing plaintiffs were not minority owners.

4. Striking of Barrett's Motion to Dismiss, Answer, and Counterclaim

A trial court has broad discretion in ruling on a motion to strike a pleading and its decision will not be reversed unless prejudicial error is clearly shown. *Dreyer & Reinbold, Inc. v. AutoXchange.com., Inc.*, 771 N.E.2d 764, 768 (Ind. Ct. App. 2002), *trans. denied sub nom. Dreyer & Reinbold, Inc. v. Tabor*, 783 N.E.2d 701 (Ind. 2002).

Barrett asserts Thomas' motion to strike was not proper because "[t]he proper procedure for *challenging the timeliness* of a pleading is to apply for default under Trial Rule 55, before the pleading is filed." (Defendants-Appellants' Br. at 29 n.23) (emphasis supplied) (quoting *DeHart v. Anderson*, 178 Ind. App. 581, 586, 383 N.E.2d 431, 435 (1978)). While this is apparently a correct statement of the law, we note that Thomas' motion to strike was not premised on a "timeliness" challenge. Rather, Thomas premised its motion primarily on mootness and *res judicata* grounds. We accordingly cannot say the trial court abused its discretion in striking Barrett's motion to dismiss, answer, and counterclaim on the ground there was no application for default.[11]

[11] Barrett also asserts the trial court's ruling "create[s] Constitutional problems" (Defendants-Appellants' Br. at 30) as it denies the Laminates defendants their due process rights under Article 1 section 12 of the Indiana Constitution and the Fifth Amendment to the United States Constitution.

Ind. Const. Art. 1, Sec. 12 states: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." The Fifth Amendment to the United States Constitution reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived

5. Existence of Fiduciary Duty

Barrett asserts the summary judgment was error to the extent it concluded Corona breached a fiduciary duty, as a corporation "is incapable of having . . . a 'fiduciary duty' to another entity. . . . Only real persons have that ability." (Defendants-Appellants' Br. at 43.) He offers no citation to authority that supports that legal premise, so he has waived that allegation of error on appeal. We accordingly will not reverse on that ground.

While we need not address in the case before us whether, or to what extent, a corporation might have a fiduciary duty toward another entity, we note our Indiana Supreme Court's language in *Melrose v. Capitol City Motor Lodge, Inc*., 705 N.E.2d 985, 990 (Ind. 1998): "[c]ourts have traditionally interpreted fiduciary duties differently for closely-held corporations as opposed to publicly held corporations for which most of the statutory norms were established." In *Murphy v. Mellon Accountants Professional Corp.*, 538 N.E.2d 968, 970 (Ind. Ct. App. 1989), *reh'g denied, trans. denied*, we addressed the Murphys' action against a corporation for breach of fiduciary duty and fraud premised on the corporation's mismanagement and failure to adequately advise them. We did not find their action against a corporation for breach of fiduciary duty was unavailable, but instead

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of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Barrett's counsel offers no convincing argument why the "open courts" provision of our Indiana Constitution is inconsistent with the striking of a defendant's motion to dismiss, how the grand jury or double jeopardy provisions of the Fifth Amendment might be implicated in this civil action, or how the striking of Barrett's motion, answer, and counterclaim has deprived Barrett of life, liberty, or property without due process of law or has taken Barrett's private property for public use without just compensation. We accordingly decline to find a violation of constitutional dimension in the trial court's grant of Thomas' motion to strike.

determined, assuming the facts showed the Murphys had a special relationship of trust and confidence with the corporation as they contended, they did not offer facts showing the corporation used its superior knowledge or influence to obtain an unconscionable advantage over them. *Id*.

We accordingly decline to reverse on the ground a corporation is necessarily incapable of having a fiduciary duty to another entity.

6. Sufficiency of Evidence to Support Amount of Judgment for Thomas

The computation of damages is strictly a matter within the trial court's discretion. *Romine v. Gagle*, 782 N.E.2d 369, 382 (Ind. Ct. App. 2003), *reh'g denied, trans. denied* 804 N.E.2d 750 (Ind. 2003). No degree of mathematical certainty is required if the amount awarded is supported by evidence in the record, but an award may not be based upon mere conjecture, speculation, or guesswork. *Id*. To support an award of compensatory damages, facts must be shown that afford a legal basis for measuring the plaintiff's loss. *Id*. To that end the damages must be referenced to some fairly definitive standard, such as market value, established experience, or direct inference from known circumstances. *Id*. at 382-83.

At the damages hearing Thomas offered as "proof of damages for [Barrett and Laminates'] breach of fiduciary duty," (Defendants-Appellants' App. at 689-690), an exhibit listing "the copies of the findings of fact, [Laminates'] submissions, and various exhibits and documents that were admitted previously," (*id*. at 690), in the summary

judgment proceedings.[12] Barrett objected to the admission of the exhibit but does not appear to argue on appeal the admission of the exhibit was error.

Most of the specific monetary amounts listed in the exhibit represented notes payable to various plaintiffs. Barrett first asserts "[t]he loss of [Thomas' and Finishing's] loan and investment amounts are simply not shown to have been attributable to Barrett or Corona nor was there any such finding of fact or conclusion of law in the summary judgment entry to that effect." (Defendants-Appellants' Br. at 36.)

We disagree. The court explicitly so found in its summary judgment order, and Barrett does not appear to challenge those findings on appeal. The Finishing plaintiffs explicitly alleged numerous times in their complaint that as a direct result of Barrett's breaches, Finishing "was unable to meet its obligations and was forced into bankruptcy," (*e.g.*, Defendants-Appellants' App. at 54), and they explicitly sought damages as measured by their "invested capital." (*E.g.*, *id*. at 68.) These allegations were incorporated into the summary judgment motion by way of the attachment of the

[12] Barrett states in his brief:

> At the damages hearing, Plaintiffs-Appellees stipulated that they were not presenting any evidence of damages for the above conclusions of breach of fiduciary duty to the LLC. Rather Plaintiffs stated that they were only presenting evidence as to the amount of money that each of the Plaintiff-Appellees loaned to the LLC.

(Defendants-Appellants' Br. at 13.) We can find no such statement or "stipulation" in the four-page span of the transcript to which Barrett's counsel directs us. Rather, as indicated above, the testimony was just the opposite—Finishing's witness explicitly stated the exhibit was offered to prove damages "*for Defendant's breach of fiduciary duty*." (Defendants-Appellants' App. at 689-90) (emphasis supplied).

complaint. The court concluded in its summary judgment that Barrett and Laminates had a fiduciary duty toward Finishing[13] and they breached that duty by a number of acts.

At the damages hearing the court asked Finishing's witness: "How does this [damages exhibit] demonstrate that this is a damage from the defendant's breach of fiduciary duty?" (Defendants-Appellants' App. at 737.) The witness explained: "because of the demise of the company, everyone that was involved with the company as far as accounts payable, notes, etcetera, lost their investment because of the breach . . . ." (*Id*.)

We cannot say the trial court abused its discretion to the extent it awarded damages based on the Finishing plaintiffs' lost investments in light of its findings on summary judgment that Barrett and Laminates had breached fiduciary duties, which breaches Thomas had alleged led to the failure of the company.

CONCLUSION

Summary judgment for Thomas and Finishing was properly granted, the trial court did not err in declining to set it aside, and there was ample evidence to support its award of damages. We accordingly affirm.

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[13] Barrett asserts Thomas and the other individual plaintiffs cannot recover because the "summary judgment against Barrett and Corona is in favor of the LLC [Finishing] only." (Defendants-Appellants' Br. at 35.) In the complaint and summary judgment motion Finishing was designated a "derivative defendant" (*e.g.*, Defendants-Appellants' App. at 470), with Thomas and the other individual plaintiffs designated as "plaintiffs." (*Id*.) We agree with Thomas that Finishing was "more truly a 'derivative plaintiff'" and its designation as a derivative defendant "may have muddled the issue." (Appellees' Br. at 14.) But we also agree "it is clear that the trial court's judgment in favor of [Finishing] was not against Thomas *et al.*, but actually in their favor too." (*Id*.) (emphasis in original). We note Barrett, in his own Notice of Appeal, lists Thomas and the other individual plaintiffs as "Plaintiffs," then states "This is an appeal from a Judgment *in favor of the Plaintiffs* and against these two defendants." We decline Barrett's invitation to ignore the context and substance of the summary judgment and to hold there was no judgment for Thomas and the other plaintiffs.

Affirmed.

VAIDIK, J., concurs.

SULLIVAN, J., concurring with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

ARVINYL METAL LAMINATES CORP. and JAMES H. BARRETT, Appellants-Defendants,	)	
vs.	)	No. 49A04-0512-CV-702
ARVINYL METAL FINISHING GROUP, LLC, Appellee-Derivative Defendant; And JOSEPH A. THOMAS, JOSEPH A. THOMAS KEOUGH, THE COMUMBIA FIRST GROUP, LTD., CARL W. GROW, CARL W. GROW FAMILY, L.P., LAWRENCE BARTLETT, THE JOHN JENNEY TRUST, MARK McCAUGHEY JOHN GIDMAN and GREG B. STEVENS, Appellees-Plaintiffs.	)	

SULLIVAN, Judge, concurring

The trial court entered partial summary judgment against Barrett upon grounds that he breached his fiduciary duty and converted certain assets. With respect to the former, Barrett asserts five bases upon which he premises an argument that there were genuine issues of fact, or in the alternative that Thomas and Finishing had not demonstrated entitlement to judgment as a matter of law.

I agree with my colleagues in rejecting three of the five bases asserted for reversal. I respectfully dissent, however, in their determination that no genuine issue of fact was demonstrated as to whether Barrett wrongly diverted from Finishing business requiring a double laminate. The majority, in doing so, notes that although Finishing may not have had "present capacity to do double-laminate work, it was acquiring that capability and did have double-laminate 'business,' in the form of its booked orders, that Barrett could have 'diverted.'" Slip op. at 12.

In my view, the essence of this holding is that there may or may not have been divertible double-laminate business at the time in question. Furthermore, the holding strongly suggests that even if there were divertible business and Barrett had the capability to divert that "business" (in the form of booked orders), there may have been an open question as to whether Barrett did actually divert such business.[14]

In any event, as to this issue, I believe it to be a matter more properly for resolution by the trier of fact.[15]

One of the other bases for the summary judgment was the alleged failure of Barrett to prepare a marketing plan. I believe the majoirity correctly observes that the fact that Grow actually prepared such plan is not inconsistent with Finishing's assertion that it was

[14] However, Barrett rests his position on the "fact" that Finishing did not have the capability to perform double-laminate work and that therefore any double-laminate work performed by Barrett (Corona) was not "taken" from Finishing. Appellant's Br. at 25. Barrett concedes that "Corona did the double laminate work," but did so "in order to provide the services to customers." Id.

[15] I choose to make no pronouncement as to whether diversion by Barrett, if it occurred, was sufficient, in and of itself, to justify the summary judgment. However, any damages accruing to Finishing for such diversion, if it occurred, would appear to be *de minimus* and not a rational basis for reversing the partial summary judgment in its entirety. The majority opinion, in its discussion of the amount of damages awarded, correctly notes that the award is exclusively (or nearly so) based upon "invested capital." Slip op. at 17.

Barrett's obligation to prepare such plan and that he failed to do so. Be that as it may, such would appear to result in the existence of an issue of fact best left to resolution by the trier of fact.

Nevertheless, any damages attributible to Barrett's alleged failure would, as in the case of diverted double-laminate work, appear to be *de minimus* and not a sound basis for reversal of the summary judgment. See note 2, supra.

Subject to the relatively minor areas of disagreement stated above, I concur in the majority opinion.